Martin Saxe

FILED
OCT 8 1928
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1928.

No. 16—Original.

*Ex Parte:*

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,

*Petitioner.*

## MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

AND

## PETITION FOR WRIT OF MANDAMUS AGAINST THE HONORABLE LEARNED HAND AND THE HONORABLE AUGUSTUS N. HAND, UNITED STATES CIRCUIT JUDGES, AND THE HONORABLE WILLIAM BONDY, DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MARTIN SAXE,
HENRY L. MOSES,
ROBERT C. BEATTY,
HERMAN G. KOPALD,
EDWARD F. COLLADAY,
*Counsel for Petitioner.*

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# Supreme Court of the United States

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No. —Original.

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*Ex Parte:*

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,

*Petitioner.*

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**Application for a Writ of Mandamus against the Honorable Learned Hand and the Honorable Augustus N. Hand, United States Circuit Judges, and the Honorable William Bondy, a District Judge of the United States District Court for the Southern District of New York.**

## MOTION FOR LEAVE TO FILE.

COMES NOW the petitioner, above named, and moves the Court for leave to file its duly verified petition, annexed hereto, praying a writ of mandamus, and moves the Court that a rule be entered and issued directing the Honorable Learned Hand, Circuit Judge, the Honorable Augustus N. Hand, Circuit Judge, and the Honorable William Bondy, a Judge of the United States District Court for the Southern District of New York, to show cause why a writ of mandamus should not issue requiring them to reconvene

as a statutory court of three judges, as provided by Section 266 of the Judicial Code (Sec. 380, Title 28, of the United States Code), for the final hearing and determination of the case of The Public National Bank of New York against Andrew B. Keating, as Receiver of Taxes of the City of New York, and William Reid, Jr., as City Collector, pending in the United States District Court for the Southern District of New York, in Equity, in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief in the premises as may be just.

Respectfully submitted,

MARTIN SAXE,
HENRY L. MOSES,
ROBERT C. BEATTY,
HERMAN G. KOPALD,
EDWARD F. COLLADAY,
Counsel for Petitioner.

# Supreme Court of the United States

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*Ex Parte:*

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,

*Petitioner.*

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## PETITION FOR WRIT OF MANDAMUS.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of THE PUBLIC NATIONAL BANK OF NEW YORK, in the City of New York, State of New York, respectfully shows:

I.

The petitioner, The Public National Bank of New York, is a national banking association duly organized, incorporated and existing under and by virtue of the National Bank Act, with its principal office and place of business located in the Borough of Manhattan, City of New York, and is, under the laws of the United States, a citizen of said State of New York and a resident of said City of New York.

II

The petitioner, on behalf of itself, its stockholders and all other national banks in the State of New York, and the stockholders thereof, similarly situated, filed on December 29, 1926, its bill in equity in the United States District Court for the Southern District of New York against Andrew B. Keating, the Receiver of Taxes of said City of New York, subsequently adding William Reid, Jr., the City Collector, as co-defendant, seeking to enjoin the defendants (the legally and duly authorized officers for the collection of taxes assessed and levied against the shares of national banks in said City of New York) and either of them from the collection of said taxes against petitioner's shares and statutory penalties thereon. This case is a test case involving the constitutionality of the New York Tax Law, a State-wide statute, Chapter 60 of the Consolidated Laws of New York, as amended by Chapter 897 of the Laws of 1923, in force from 1923 to 1926, inclusive, whereby the shares of national banks are taxed 1% based on the capital, surplus and undivided profits of the bank. The attack is upon discrimination arising out of the more favorable taxation of other moneyed capital in the hands of individual citizens of the State coming into competition with the business of national banks, in violation of Section 5219, U. S. Revised Statutes.

> *First National Bank* v. *Hartford*, 273 U. S. 548.
> *Minnesota* v. *First National Bank of St. Paul*, 273 U. S. 561.

As construed by the Court of Appeals of the State of New York and applied, the petitioner alleges and contends the said Tax Law relieves a vast bulk of such competing moneyed capital from equivalent taxation and thus discriminates against national bank shares contrary to said Federal statute.

> *People ex rel. Pratt* v. *Goldfogle et al.*, 242 N. Y. 277, and companion cases, 242 N. Y. 540-546, decided March 30, 1926.

The relevant provisions of the Tax Law of the State of New York are printed as Schedule "C" to this petition.

The Printed Transcript of the complete record for final hearing in said cause (in two volumes) is submitted herewith as Schedule "D" to this petition. The bill of complaint will be found at pages 1 to 18 of the Printed Record.

III.

An application for an interlocutory injunction order, on notice to the Governor and Attorney General of the State of New York, based on said bill in equity, was made to District Judge William Bondy, who called to his assistance Circuit Judge Charles M. Hough and Judge Augustus N. Hand, then a District Judge (Application for Interlocutory Injunction, Printed Record, pp. 27-34; Bill in Equity, Record, p. 1). That Court, all the Judges thereof concurring, duly granted the interlocutory injunction order on January 24, 1927, restraining the defendant "in the enforcement and execution of the provisions of the Tax Law of the State of New York involved herein and from enforcing or taking any steps to enforce the collection of said taxes and penalties referred to in said bill of complaint," etc. (Record, p. 35). The Court unanimously denied the defendants' motion to dismiss the bill of complaint on April 1, 1927 (Record, pp. 58-59). Thereafter, Judge Hough became incapacitated, and Circuit Judge Learned Hand was substituted in his place, and later Judge Augustus N. Hand became a Circuit Judge. The cause was referred to a Special Master on April 9, 1927, to take the proofs and report findings of fact (Record, pp. 63 and 66), and testimony and evidence were completely taken but the Special Master died before making his report (Record, p. 72). At the suggestion of the statutory court of three judges, the whole record was reduced in compliance with Equity Rule 75b and printed for the statutory court in the form for the United States Supreme Court in preparation for a direct appeal to this Court. The cause thereafter on July 9, 1928, came on for final hearing before the statutory court so constituted upon the

proofs as taken by the Special Master and was argued (Record, p. 72). Thereupon the Judges of their own motion raised the question whether the cause arose under Section 266 of the Judicial Code, and whether, therefore, the two Circuit Judges had any jurisdiction in the premises. Upon consideration of said question, said statutory court decided, on July 24, 1928, that the suit was not one to which Section 266 of the Judicial Code applies and ordered that the statutory court hitherto convened to hear the same be dissolved, and that the cause proceed before a single District Judge. The order of said Court to that effect is Schedule "A" hereto and the opinion which accompanied it is Schedule "B" hereto.

In the plaintiff's brief on final hearing before the statutory court, the following statement and citation of authorities in support of a court of three judges for this case was made:

> "As this suit, brought to restrain officers of the state, involved the constitutionality of the Tax Law of the State of New York, *as construed and applied*, the application for a preliminary injunction was necessarily made to a court of three judges, and the papers were served upon the Governor and the Attorney General of the State of New York, under Section 380, Title 28, of the United States Code (Sec. 266, Judicial Code). The Attorney General appeared herein throughout the proceedings. See recent U. S. Supreme Court decisions: *Gulf Fisheries Co. v. D. B. MacInerney, County Attorney*, 72 L. ed. (Adv.) 288 (Feb. 20, 1928); *Marcus Brown Co. v. Feldman*, 256 U. S. 170, aff'g 269 Fed. 306, suit against the District Attorney; *Chicago, M., St. P. & P. R. R. Co. v. Risty, County Commissioner*, 72 L. ed. (Adv.) 365 (April 9, 1928); *St. Louis & S. W. Ry. Co. v. J. H. Nattin, Tax Collector* of a road district, 72 L. ed. (Adv.) 541 (May 14, 1928); *Ex parte Ruder*, 271 U. S. 461; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278. City officers are called in the opinion 'State' officers.
>
> This is a case of importance and unusual gravity, requiring special treatment in the interest of the public, as it affects the taxation of all national

bank shares held by thousands of stockholders, from 1923 to 1926. See *Ex parte J. D. Collins*, U. S. Supreme Court, June 4, 1928."

IV.

The gravamen of the bill of complaint is, that a State-wide statute, to wit, the Tax Law of the State of New York (being Chap. 60 of the Consolidated Laws), as amended by a State-wide statute, to wit, Chapter 897 of the Laws of 1923, in respect of the taxation of national bank shares and other moneyed capital in the hands of individuals coming into competition with the business of national banks, *as said statute was construed and applied in the City of New York and throughout the State*, authorized discrimination and in fact discriminated against national bank shares in their taxation, in violation of the restriction of Section 5219 of the Revised Statutes of the United States and the Constitution of the United States, and furthermore, in violation of the Fourteenth Amendment thereof (Complaint, Part "Second," par. 6, subds. (a) and (b), Record, pp. 4-5).

The said bill of complaint alleges that "said Commissioners of Taxes and Assessments (of the City of New York) in making said assessments upon national bank shares, and upon said other moneyed capital, for the year 1926 in said City of New York, *complied with the provisions of said Tax Law, as construed*" (Complaint, Part "Third," par. 12, Record, pp. 12-13).

V.

The statute under which petitioner's shareholders were assessed, imposed an *ad valorem* tax upon bank shares of 1%, measured by the capital, surplus and undivided profits of the bank, uniform throughout the State. In *People ex rel. Hanover National Bank* v. *Goldfogle et al.*, 234 N. Y. 345; certiorari denied, 261 U. S. 620, this was held to be a discriminatory tax in violation of Section 5219 of the United States Revised Statutes, for the reason that in 1919 all competing moneyed capital (except State bank shares and trust companies) had been exempted

from *ad valorem* taxation, and was taxed only so far as the income thereof might be reached if and when included in net income taxable under the personal income tax and the corporation income tax.

In said *Hanover National Bank* decision the Court said (at p. 354):

> "In a very considerable number of cases the valuation tax must inevitably be the heavier burden. It is fixed and certain. The income tax is variable and dependent on income and amount of income. It is conceivable that when returns on such capital are low, the bank stock would be taxed and the competing capital would be exempt. In no event would equality exist unless the income on competing capital were large beyond the dreams of avarice and the usual returns on investments."

Thereupon, by Chapter 897, Laws of 1923, an *ad valorem* tax of 1% was imposed upon "moneyed capital coming into competition with the business of national banks," without further description or definition of what was thereby sought to be taxed.

In *People ex rel. Pratt* v. *Goldfogle et al.*, 242 N. Y. 277, and companion cases, 242 N. Y. 520-546 (decided March 30, 1926), said Chapter 897 was construed as *not* applying to various types of business employment of moneyed capital and personal investment thereof which petitioner contends are competitive, and out of eight test cases only one assessment was upheld, to wit, that of a private banker.

The effect of such construction of the statute by the highest court of the State, with the limitation necessarily imposed thereby upon the authority of assessing officers, the petitioner alleges and contends is that

(a) the great bulk of said other competitive moneyed capital in the City and State of New York, *totaling billions of dollars*, relatively material in amount in comparison with the capitalization of the national banks therein, used in the various businesses,

transactions, operations and investments like those in which national banks engaged both in New York City and throughout the said State where national banks are located, was excluded from the operation of said statute and only a very small part of it, in rare and exceptional instances, subjected to equivalent taxation. From 1923 to 1926, inclusive, under said Tax Law, as amended as aforesaid, said great bulk of such competitive moneyed capital so excluded from any *ad valorem* taxation whatsoever, was only subjected to income taxation if and when it yielded any taxable net income. In the case of individuals the net income tax rates were, 1% on the first $10,000, 2% on the next $40,000, and 3% on all additional net income. In the case of corporations the net income tax rate was 4½%. Said income tax rates can only yield taxes equivalent to the 1% *ad valorem* tax imposed on bank shares when the net income of individuals is 100%, 50% and 33⅓% on the capital, according to the respective classes of personal income, and 22¼% on the capital of corporations (Complaint, Record, p. 5);

(b) in 1926, the moneyed capital assessments made in the City of New York totaled only 150 against individuals (substantially all of whom were in the business of banking) and 100 against financial corporations, in the total sum of approximately $50,000,000 for each class; and in all the other taxing districts in the State, only 60 individual and 17 corporation moneyed capital assessments were made in the grand total of approximately $1,750,000 (Stipulation of Facts, Record, pp. 218-219);

(c) in 1926 there were 542 national banks in the State, with thousands of stockholders, all assessed upon the value of their respective shares, based on the capital, surplus and undivided profits of their respective banks, in the approximate total of $700,000,000, and taxed 1% thereon (Stipulation of Facts, Record, pp. 219 and 222).

## VI.

That, as appears from the bill of complaint, said Chapter 897 of the Laws of 1923 was finally construed by the Court of Appeals in said *People ex rel. Pratt* v. *Goldfogle et al., supra*, decided March 30, 1926 (Record, pp. 8-12); that after the 1926 assessment of national bank shares, the earliest moment for equity to interfere, the petitioner promptly sought to enjoin the collection thereof. The 1926 assessment of the petitioner's said shares totaled $13,342,960.77, upon which the said taxes herein involved, at the statutory fixed rate of 1%, amounted to $133,429.61 (Record, p. 7). That the 1926 assessments of the shares of national banks in the City of New York totaled approximately $567,789,379.95 and in all other tax districts in said State, $133,000,000, making a grand total of about $700,000,000. In the years 1923 to 1925 such assessments of the shares in national banks ranged upwards from $485,975,395 in the City of New York and upwards from $121,802,044 in all other tax districts in said State (Complaint, Record, pp. 10-11). That under the construction and application of said State statute in force from 1923 to 1926, inclusive, the petitioner alleges and contends, the assessments of the shares of all national bank stockholders in said State during said years were in contravention of their rights under the laws and Constitution of the United States (Complaint, Record, pp. 4-5).

## VII.

A further discrimination, under said Tax Law, against national bank shareholders, the petitioner alleges and contends, arises from the fact that the shares (except shares of State banks) of corporations competing with national banks were wholly exempted from taxation and only trust companies were subjected to equivalent taxation. Such other competing corporations being taxed only upon certain of their taxable assets, excluding all tax exempt securities and real estate, the petitioner alleges and contends there was not equivalent taxation of their shareholders, as national bank shares were assessed on the basis

of the inclusion of all capital assets of every kind and nature (Complaint, Record, pp. 5, 6, 12 and 13).

VIII.

The question of the mandatory inclusion of the real estate of the bank within the State (separately assessed and taxed to the banks) in the assessed valuation of the shares, is here directly involved. Under the taxing statute herein, the petitioner alleges and contends, neither from its text nor its construction were the assessors compelled to include the value of any real estate within the State or otherwise held by competing corporations, in the assessment of their moneyed capital. While this Court has apparently never had occasion to directly pass upon the question of the inclusion of the real estate of national banks in the assessment of their shares (which real estate is separately taxed as such), the petitioner contends it was clearly indicated in *First National Bank of Albuquerque* v. *Albright*, 208 U. S. 548, at pages 552-553, that real estate taxed to the bank is "meant to be deducted by Rev. Stat. §5219." While most of the States have followed that interpretation of said Section 5219, the petitioner alleges and contends the State of New York disregarded it during the years 1923 to 1926, inclusive, and the real estate within the State of national banks in New York represents a very substantial part of their paid-in capital (Complaint, Record, pp. 13 and 14).

IX.

That the question of the alleged unconstitutionality and illegality of said taxes for the years 1923, 1924, 1925 and 1926 under said State statute, as construed and applied, in the City of New York and throughout said State, is one of common and general interest to many persons in said State, comprising thousands of national bank stockholders.

X.

The suit is one to restrain "the enforcement, operation, or execution of" a statute of the State of general applica-

tion throughout the State, within the meaning of Section 266 of the Judicial Code. It is a case "of special importance and requiring special treatment in the interest of the public" (*Ex parte Collins*, United States Supreme Court, decided June 4, 1928).

We respectfully submit that the instant case is just such a case as Section 266 of the Judicial Code was designed to meet. It is a test case to settle the constitutionality of an important part of the general tax law of the State of New York imposing a tax on shares of national banks. It is not a case where further local legislative action is required under an enabling state statute, as in the *Collins* case, *supra*, but one where the state statute itself is directly involved in the question of the alleged unconstitutionality. Thus the petitioner has sought to directly restrain the "enforcement, operation, or execution" of a statute of the State by officers of the State within the meaning of Section 266.

A prompt final determination herein is highly desirable in the public interest in order to settle the question of the validity of all national bank stock taxes in said State, from 1923 to 1926, inclusive, involving the claims of thousands of national bank stockholders, aggregating many millions of dollars.

The petitioner is advised that the Attorney General of New York will present on behalf of the People of the State of New York a joinder in this motion and petition and representation in support thereof.

XI.

By reason of all the facts herein stated, the United States District Court for the Southern District of New York, the petitioner believes, is without jurisdiction to hear and determine said cause upon the final hearing without the presence of three judges, as required by Section 266 of the Judicial Code (Sec. 380, Title 28, U. S. Code). The petitioner has no means of relief except by application for a writ of mandamus.

The petitioner prays that a writ of mandamus may issue out of this Court, directed to the Honorable Learned Hand, Circuit Judge, the Honorable Augustus N. Hand, Circuit Judge, and the Honorable William Bondy, District Judge, requiring them to reconvene as the statutory court herein for the determination of said cause on the final hearing, as provided by Section 266 of the Judicial Code (Sec. 380, Title 28, U. S. Code).

THE PUBLIC NATIONAL BANK
OF NEW YORK,

By WALTER G. FERENS,
Cashier and Vice-President,
Petitioner.

MARTIN SAXE,
HENRY L. MOSES,
ROBERT C. BEATTY,
HERMAN G. KOPALD,
EDWARD F. COLLADAY,
Counsel for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WALTER G. FERENS, being duly sworn, deposes and says: That he is the Cashier and Vice-President of the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that deponent derives his knowledge of the allegations therein set forth from statements made to him by counsel, officers, agents and employees of the petitioner, and from information acquired by him in the performance of his duties; that the reason why this verification is made by deponent and not by the petitioner, is that petitioner is a national banking association and deponent is an officer thereof, to wit, its Cashier and Vice-President.

WALTER G. FERENS.

Sworn to before me this
24th day of September, 1928.

J. C. RUBEN,
Notary Public, New York County No. 265.
Commission expires March 30, 1929.
(Notarial Seal)

## SCHEDULE "A."

### Order Dissolving Court of Three Judges.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PUBLIC NATIONAL BANK OF NEW YORK,
Plaintiff,

against

ANDREW B. KEATING, as Receiver of Taxes of the City of New York, and WILLIAM REID, JR., as City Collector,
Defendants.

This cause came on to be heard at the July, 1928, term of this court and was argued and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that, it appearing that the suit is not one to which Section 266 of the Judicial Code applies, the statutory court hitherto convened to hear the same be and the same hereby is dissolved, and that the cause do proceed before a single district judge.

July 24, 1928.

LEARNED HAND,
*Circuit Judge.*

AUGUSTUS N. HAND,
*Circuit Judge.*

WM. BONDY,
*District Judge*

## SCHEDULE "B."

### Opinion Dissolving Court of Three Judges.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PUBLIC NATIONAL BANK OF NEW YORK,
Plaintiff,

against

ANDREW B. KEATING, as Receiver of Taxes of the City of New York, and WILLIAM REID, JR., as City Collector,
Defendants.

E 39-380

Before: L. HAND and AUGUSTUS N. HAND, Circuit Judges, and BONDY, District Judge, sitting as a statutory court constituted under Section 266 of the Judicial Code.

On final hearing of a bill in equity to enjoin the Receiver of Taxes of the City of New York and its City Collector from collecting a tax upon the shares of the plaintiff's stock levied for the year 1926 in accordance with chapter 897 of the laws of 1923 of New York.

The plaintiff is a National Bank and the bill alleges that the law of New York authorizing a tax of one per cent. upon its shares, as that act has been construed by the Court of Appeals of that State, and applied by the Commissioners of Taxes and Assessments of the City, is unconstitutional. This unconstitutionality depends first upon the assertion that so applied the law is not within the consent of Congress as manifested by Revised Statutes Section 5219, as amended in 1923, and second, that without that consent no tax whatever may be levied upon a National Bank or its shares. The bill further alleges that in

any event while all bank shares including the plaintiff's were assessed by the City Commissioners and a tax of one per cent. levied upon them the Commissioners omitted to assess the greater part of the moneyed capital in the City which came into competition with the business of National Banks, the plaintiff among the rest. Hence it resulted that the plaintiff was subjected to a discrimination contrary to the Act of Congress and the Fourteenth Amendment.

The district judge before whom came a motion for a preliminary injunction called to his assistance Judge Hough and Judge Augustus N. Hand, then a district judge. A preliminary injunction was granted, and a motion denied to dismiss the bill for lack of equity. Thereafter Judge Hough became incapacitated, and Judge Learned Hand was substituted in his place, and later Judge Augustus N. Hand became a circuit judge. The cause was referred to a master to take the proofs; he completed them before his death, but failed to prepare his report. The cause thereafter came on for a hearing before the statutory court so constituted upon the proofs as taken by the master. The judges of their own motion thereupon raised the question whether it arose under Section 266 of the Judicial Code, and whether therefore the two circuit judges had any jurisdiction in the premises.

MARTIN SAXE for the plaintiff.
WILLIAM H. KING for the defendants.

*Per Curiam:*

Section 266 of the Judicial Code so far as relevant reads as follows: "No * * * injunction * * * restraining the enforcement * * * of any statute of a State by restraining the action of any officer of such State in the enforcement * * * of such statute, or * * * of an order made by an administrative board or commission acting under * * * the statutes of such State shall be issued * * * upon the ground of the unconstitutionality of such statute" except by a court of three judges. It is apparent that three judges are necessary only when the suit is to restrain an "officer of such State" who proposes to enforce

a statute or the order of an administrative board. The Receiver of the City of New York and its City Collector are not officers of the State, except in so far as, like all other public officers, they indirectly derive their powers from the legislature. They are both appointed by the Comptroller of the City, himself an officer of the City. They have no duties except in respect of collecting the taxes levied by the City's assessing officers. Unless all municipal officials are within the class mentioned in the section, they are not.

Until the decision of the Supreme Court in Ex parte Collins, June 4, 1928, it was open to some doubt what was the proper meaning of the phrase. There had been some cases in which the defendants were local municipal officers and the merits had been considered; they are cited in Ex parte Collins with the comment that in none had the point been considered. Conversely, in other cases the cause had been disposed of by a single judge. We think that Ex parte Collins has settled the question. It is quite true that in that case the constitutionality of the statute was involved only through a municipal resolution which determined that a local improvement should be made, and it was held that the suit was one to enjoin the resolution itself, though the sole complaint was as to the procedure provided in the statute. Even if that were taken as the entire scope of the decision, the assessment for taxes by a board of the city tax assessors seems to us to be an "order of a city board" as that phrase was used. Upon this point the court cited with approval City of Dallas v. Dallas Telephone Co., 272 Fed. Rep. 410 (C. C. A. 5), a case which held that a court of three judges was not necessary to review the validity of the order of a city board of commissioners fixing telephone rates within the city. It appears to us that the assessment of a board of tax commissioners must be treated as of the same kind.

However, the scope of the decision is not to be so limited; it also held that "local officers" were not "officers of such State," when "the suit involves matters of interest only to the particular municipality or district involved." Upon this point the court cited Connor v. Board of Com-

missioners, 12 Fed. (2) 789 (D. C. S. D. of Ohio), in which the suit was to enjoin a board of county commissioners from proceeding to establish a sewerage district and to assess the cost upon adjacent lands. It was held that as the commissioners were local officers, Section 266 did not control, and two of the judges withdrew. This decision in turn rested upon an earlier ruling of the same court, (Connecting Gas Co. v. Imes, 11 Fed. (2) 191), where the bill was of substantially the same kind as here. That is, it sought to enjoin five county treasurers from collecting taxes alleged to have been assessed by discriminatory assessments.

The only matter of doubt appears to us to be the meaning of the sentence quoted above, suggesting that the matter at stake must be of only local interest. The defendants are indeed local officers, but in accordance with very general practice the State collects her taxes in part through municipalities. To this extent therefore they act for the State, and the issue is of more than local interest. It may be that the language used was meant to cover the case of a local officer in whom was vested power to enforce statutes of State-wide concern, as, for instance, local State's attorneys. We do not, however, believe that it was meant to cover the fiscal officers of a city or county, merely because the State shared in their collections. That was probably the case in Connecting Gas Co. v. Imes, but it was held to be not enough. Were it so, the result would be that three judges must sit, and the Supreme Court hear appeals, in every case in which a taxpayer challenges on constitutional grounds the validity of any tax whatever, for the State shares in them all. This we regard as impossible. The recent decisions of the Supreme Court prove that it is acutely aware of the burden which a loose construction of the section will bring upon itself and upon the district courts. It would be a strained interpretation that let in all cases in which the State has an indirect and small concern.

Nor can we read the sentence quoted as meaning that the matter involves more than local interests, when as a precedent it may prove binding generally. Ex parte Col-

lins was itself such a case; a decision on the merits would have determined the validity of the State statute not only for the City of Phoenix, but for the whole State of Arizona. We think it enough to dispose of the case at bar to say that the conduct proposed to be enjoined is no more than the collection by local city officials of a tax primarily for the use of the city.

Therefore the two circuit judges will withdraw from the cause and the district judge will dispose of it like any other case in this court.

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## SCHEDULE "C."

### Relevant Provisions of the Tax Law of the State of New York, Chapter 60 of the Consolidated Laws of the State of New York, as amended by Chapter 897 of the Laws of 1923, as effective in 1926.

### ARTICLE 1.

TAXABLE PROPERTY AND PLACE OF TAXATION.

§ 4 a. *Exemption of intangible personal property.* Notwithstanding any provision of this chapter, or of any other general, special or local law, intangible personal property, whether referred to as personal property, capital, capital stock or otherwise, shall be exempt from taxation locally for state or local purposes, except shares of stock of banks or banking associations and except other moneyed capital coming into competition with the business of national banks, which shares and other moneyed capital shall be taxed locally for state or local purposes as prescribed by this chapter, provided that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this sec-

tion. This exemption shall be in addition to all other exemptions of personal property from local taxation, whether based upon the character, ownership or amount of property. The term "intangible personal property," as used in this section, means incorporeal property, including money, deposits in banks, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt.

## ARTICLE 2.

### Mode of Assessment.

§24. *Bank shares, how assessed.* The value of each share of stock of each bank and banking association, except such as are in liquidation, shall be ascertained and fixed by adding together the amount of the capital stock, surplus and undivided profits of such bank or banking association and by dividing the result by the number of outstanding shares of such bank or banking association. The value of each share of stock in each bank or banking association in liquidation shall be ascertained and fixed by dividing the actual assets of such bank or banking association by the number of outstanding shares of such bank or banking association. The owners of the stock of banks and banking associations shall be entitled to no deduction from the taxable value of their shares because of the personal indebtedness of such owners, or for any other reason whatsoever. This section is not to be construed as an exemption of the real estate of banks or banking associations from taxation. No shares of stock of such banks and banking associations, by whomsoever held, shall be exempt from the tax hereby imposed.

§24-b. *Bank shares; rate of tax.* The rate of tax upon the shares of stock of banks and banking associations shall be one per centum upon the value thereof, as ascertained and as fixed in the manner hereinbefore provided.

§24-e. *Bank shares; exemption from other taxes.* The said bank tax shall be in lieu of all other taxes whatsoever for state, county or local purposes upon the said shares of stock, and mortgages, judgments and other choses in action and personal property held or owned by banks or banking associations the value of which enters into the value of said shares of stock shall also be exempt from all other state, county or local taxation. • • •

§24-f. *Bank tax; collection and payment.* It shall be the duty of every bank or banking association to collect the tax due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county wherein said bank or banking association is located, except that in the city of Buffalo such tax shall be paid to the city treasurer of said city, and in the city of New York to the receiver of taxes thereof on or before the thirty first day of December in said year; and any bank or banking association failing to pay the said tax as herein provided shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for a sum, in addition to the amount of said tax, equal to five per centum thereof and for an additional sum equal to seven per centum per annum calculated upon the amount of said tax from the day upon which said tax became due and payable to the date of payment. Every bank or banking association so paying the taxes due upon the shares of its stock shall have a lien on the shares of stock, and on all property of the several share owners in its hands, or which may at any time come into its hands, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner. The tax shall be paid by the respective banks in the city of New York to the said receiver of taxes on or before the thirty first day of December in said year, and said tax shall be collected by the said receiver of taxes and shall be by him paid into the treasury of said city to the credit of the general fund thereof. The tax shall be paid by the respective banks in the city of Buffalo to the city treasurer

of said city on or before the thirty-first day of December in said year, and said tax shall be collected by the said treasurer and credited to the general fund of said city.

§25. *Moneyed capital other than shares of banks and trust companies; how assessed.* Moneyed capital coming into competition with the business of national banks, except shares of national banks and of banks or trust companies organized under the authority of this state, and except bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall be assessed at its actual value against the owners or holders thereof and such owners or holders shall be entitled to no deduction from such actual value because of the personal indebtedness of such owners or holders and in determining such actual value allowance shall be made for existing indebtedness incurred in the acquisition of such moneyed capital; and moneys deposited with a taxpayer, or securities in his possession as pledgee or bailee, shall not be included in determining the actual value of the moneyed capital owned or held by such taxpayer. No such moneyed capital by whomsoever owned or held shall be exempt from the tax hereby imposed.

§25-b. *Moneyed capital; rate of tax.* The rate of tax upon moneyed capital assessed as herein provided shall be one per centum upon the value thereof as ascertained and fixed in the manner hereinbefore provided.

§25-c. *Moneyed capital; exemption from other taxes.* The said tax on such moneyed capital as hereinbefore provided shall be in lieu of all other taxes whatsoever for state, county or local purposes on such moneyed capital.

## ARTICLE 16.

### Taxes upon and with Respect to Personal Incomes.

§351. *Imposition of income tax.* A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. * * *

§359. *Gross income defined.* The term "gross income":

* * * * * * *

2. Does not include the following items which shall be exempt from taxation under this article:

* * * * * * *

4. Income received as dividends on shares of banks and banking associations taxable as provided by article two of this chapter.

5. Income received from moneyed capital taxable as provided by article two of this chapter, including money received as dividends, or a proportion of such dividends, of a corporation whose capital in whole or in part is taxable under such article.

* * * * * * *

## ARTICLE 9-A.

### Franchise Tax on Business Corporations.

§208. *Definitions.* As used in this article:

* * * * * * *

3. The term "entire net income" means the total net income, including * * * exclusive of income from dividends on shares of trust companies subject to franchise

tax as provided by section one hundred and eighty-eight of this chapter and income from dividends on shares of banks and banking associations taxable as provided by article two of this chapter, and income received from moneyed capital taxable under such article, including dividends, or a proportion of such dividends, of a corporation whose capital in whole or in part is taxable under such article, • • •.

§215. *Rate of tax.* The tax imposed by this article shall be at the rate of four and one-half per centum of the entire net income of the corporation or portion thereof taxable within the state, determined as provided by this article, unless taxable upon its capital stock at the rate of one mill or subject to the minimum tax of ten dollars, as provided in section two hundred and fourteen of the tax law.

FILED
OCT 29 1928
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1928.

**No. 16—Original.**

*Ex Parte:*

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,
*Petitioner.*

## MEMORANDUM FOR PETITIONER UPON RETURN OF RULE TO SHOW CAUSE.

The learned Statutory Court has overlooked the theory of the administration of the New York scheme for taxing bank shares under the Tax Law, by virtue of which the local officers charged with the duty of the enforcement thereof act essentially as State administrative officers.

This is indicated by the decision of the Court of Appeals in *People ex rel. Bridgeport Savings Bank* v. *Feitner*, 191 N. Y. 88, 100, where it is stated:

> "The board of aldermen levies no tax on bank stock, but the commissioners of taxes and assessments certify the amount of tax and the persons taxable to the receiver of taxes on or before the fifteenth of September [now December] and the taxes thereon become payable during that month.

> Thus it is evident that the scheme of taxing bank shares, not only in respect to the amount but also *as to the method and manner of its imposition, stands by itself, independent and separate from that prescribed for the assessment and taxation of other property.* It follows, therefore, that the *charter provisions do not apply to the taxation of bank stock, but the general law as it appears in sections thirty-five and thirty-six"* (now Secs. 24 to 24-g, inclusive). (Italics ours.)

Under the Tax Law of the State of New York (Chap. 60 of the Consolidated Laws of New York, as amended by Chap. 897 of the Laws of 1923), the "assessment" of bank shares is made by the local assessors, but in the "levying" and "collection" of bank stock taxes under Sections 24 to 24-g, inclusive (formerly Secs. 35 and 36), thereof, the boards of supervisors of the various counties outside the City of New York and the Board of Tax Commissioners in the City of New York exercise a *purely administrative function as State agencies*, in carrying into effect the uniform Statewide provisions of the Tax Law with respect to the levying and collection of such taxes.

The whole scheme of taxation of bank shares, in Sections 24 to 24-g, inclusive, of the Tax Law of the State of New York, is quite distinct and separate from the assessment and collection of local real estate and personal property taxes. The basis of valuation and the rate of tax for bank shares are expressly fixed by the statute and are uniform throughout the State; they cannot be varied by local legislative bodies, and the acts of local taxing officials under the statute are purely administrative in carrying out its directions. (See Schedule "C" to Petition for Mandamus for portions of the statute set forth at pp. 21, 22.)

By Section 24-c, it is provided:

> "The board of supervisors shall issue their warrant or order to the county treasurer * * * *commanding* him to *collect*" the bank stock taxes, and it is further provided that "said county treasurer shall have the same powers to enforce the collection and payment of said tax as are possessed by the officers now charged by law with the collection of taxes."

By Section 24-d, it is specifically provided:

> "that, in the city of New York the statement of the *bank assessment and tax herein provided for* shall be made by the *board of tax commissioners of said city* on or before the 15th day of December in each year and *by them* forthwith mailed to the respective banks and banking associations located in said city, and a *certified copy thereof sent to the receiver of taxes of said city.* * * *" (Italics ours.)

As shown in the decision of the Court of Appeals in *People ex rel. Bridgeport Savings Bank* v. *Feitner, supra*, and said statute, the Receiver of Taxes of the City of New York and the City Collector, defendants here, act in the capacity of administrative officers of the State under the Tax Law, with respect to the collection of taxes on bank shares, and do not act under the provisions of the Greater New York Charter relating to the taxation of other property. The same is true of the Board of Tax Commissioners of the City of New York in certifying, under the State law, a copy of the statement of the assessment of shares of national banks and the fixed 1% tax thereon.

It would seem, therefore, in harmony with the statement in the opinion of the learned court below to the effect that "it may be that the language used [in Sec. 266] was meant to cover the case of a local officer in whom was vested power to enforce statutes of State-wide concern, as, for instance, local State's attorneys," that the defendants herein with respect to the collection of taxes on bank shares stand upon exactly the same footing.

While in the instant suit the City of New York only is immediately involved, the direct attack upon the constitutionality of the State taxing statute is of vital interest to every municipality and taxing district in the State where the shares of national banks were assessed during the years 1923 to 1926, inclusive, as well as to thousands of stockholders of national banks throughout the State.

The provision of Section 266 of the Judicial Code that "Said application shall not be heard or determined before at least five days' notice of the hearing has been given to

the governor and to the attorney general of the state, *and to such other persons as may be defendants in the suit*" indicates that the defendants may be "officers of such State" who are not technically "State officers" as the latter would be represented as a matter of course by the Attorney General.

The instant case is readily distinguishable from the cases cited in the opinion of the Court below. In none of them was there an attack upon the constitutionality of a State-wide statute, *directly involving the constitutional rights of a large class of taxpayers in all parts of the State.*

Respectfully submitted,

MARTIN SAXE,
HENRY L. MOSES,
ROBERT C. BEATTY,
HERMAN G. KOPALD,
EDWARD F. COLLADAY,
*Counsel for Petitioner.*

FILED
OCT 8 1928
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

October Term, 1928

No. 16—ORIGINAL

EX PARTE:

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,
*Petitioner.*

**Statement on Behalf of Andrew B. Keating, as Receiver of Taxes of the City of New York and William Reid, Jr., as City Collector.**

GEORGE P. NICHOLSON,
*Corporation Counsel of The City of New York.*

WILLIAM H. KING,
EUGENE FAY,
Of Counsel.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. —Original.

Ex Parte:

In the Matter
of
THE PUBLIC NATIONAL BANK
OF NEW YORK,
*Petitioner.*

Statement on behalf of Andrew B. Keating as Receiver of Taxes of The City of New York and William Reid, Jr., as City Collector.

The Receiver of Taxes of The City of New York and the City Collector of said City, defendants in the action brought against them by the Public National Bank of New York as plaintiff, in which the plaintiff has moved for leave to file a petition for a writ of mandamus directed to Honorable Learned Hand, Circuit Judge, the Honorable Augustus N. Hand, Circuit Judge, and the Honorable William Bondy, District Judge, requiring them to reconvene as a statutory court herein for the determination of said cause on the final hearing, respectfully beg leave to submit the following statement for the information of this Court.

The said action to restrain the collection of local taxes on bank shares payable to the City of New York, was defended by the Corporation Counsel of the City of New York as attorney for said defendants, and the City of New York and not the State of New York is financially interested in the final determination of said action.

The Attorney General of the State of New York appeared in the action as the plaintiff sought to have the action determined by a statutory court, and although he joined in the defendants' preliminary motion before that court for dismissal of the action, he took no part in the trial before the Master who was appointed, nor in the argument before the Court after the trial.

The defendants are now informed that the Attorney General of the State of New York, as stated in the plaintiff's petition (page 12), will present herein a joinder in the plaintiff's motion and petition.

In view thereof and as neither the said petition nor the joinder of the Attorney General, make any reference to the attitude of the defendants or of the Corporation Counsel of the City of New York, respecting such motion and petition, the defendants wish to advise this Court that such joinder by the Attorney General does not represent the attitude of the defendants on the plaintiff's application.

On the contrary, the defendants intend to oppose the issuance of such writ, should this Court grant the plaintiff's application for leave to file the petition, and this statement is submitted solely to advise this Court of the defendant's position in the matter and to remove any misapprehension that

may arise because of the joinder of the Attorney General in the plaintiff's application.

As no formal notice of the application has been given to the defendants, the merits of the plaintiff's application for mandamus and its right to injunctive relief in the action, are not discussed herein, such questions being reserved for the argument to be had on the hearing in the event that this Court should grant the plaintiff's application for leave to file its petition.

Dated New York, October 1, 1928.

Respectfully submitted,

GEORGE P. NICHOLSON,
Corporation Counsel of the
City of New York,
Attorney for Andrew B. Keating as
Receiver of Taxes of the City of
New York, and William Reid, Jr.,
as City Collector, Defendants.

WILLIAM H. KING,
EUGENE FAY,
of Counsel.

FILED
OCT 29 1928

# Supreme Court of the United States

October Term, 1928

No. 16 ORIGINAL

*EX PARTE:*

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,
*Petitioner.*

**Memorandum on Behalf of the Receiver of Taxes of the City of New York and the City Collector of Said City in Opposition to Motion for Mandamus.**

GEORGE P. NICHOLSON,
*Corporation Counsel of The City of New York.*

WILLIAM H. KING,
EUGENE FAY,
Of Counsel.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

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No. 16—Original.

*Ex Parte:*
In the Matter
of
THE PUBLIC NATIONAL BANK
OF NEW YORK,
*Petitioner.*

## Memorandum on behalf of the Receiver of Taxes of The City of New York and the City Collector of said City in opposition to motion for mandamus.

The rule to show cause in this matter not being directed to the Receiver of Taxes of New York City or the City Collector of said City, oral application was made to this Court on October 17, 1928, for leave to file on October 29, 1928, for which date the motion herein was set down, a memorandum on behalf of said officials, and for leave to argue in opposition to the motion for mandamus. The application for leave to file a memorandum in opposition to the motion was granted, this Court reserving, however, for determination on October 29, 1928, the application for leave to argue in opposition.

The concrete question presented for determination on the motion is as to whether the injunction sought to be obtained in the action heretofore commenced in the United States District Court for the Southern District of New York by the Public National Bank of New York, plaintiff, against Andrew B. Keating as Receiver of Taxes of said City and William Reid, Jr., City Collector of said City, defendants, is one for which provision is made by section 380, Title 28, of the United States Code (sec. 266, Judicial Code).

The question was raised of their own motion by the three judges sitting as a statutory court on final hearing (Return, Paragraph "Sixth," p. 4) and they determined that the case presented was not one for which provision was made by section 266 of the Judicial Code. The defendants did not raise the question, relying on their motion to dismiss the suit on the broader grounds that this was not a proper cause for equity intervention and that complete and adequate remedies were afforded the plaintiff by the laws of New York (pp. 55-56, Transcript of Record) and relying on their claims that upon the merits, in view of the facts and the law, no grievance existed, and hence no injunction should issue.

It is respectfully submitted by the defendants that the conclusion reached by the said three judges that the suit was not one to be determined by a statutory court was proper and that the plaintiff's motion for mandamus to compel such a determination should be denied by this Court.

In support of this contention the defendants urge the following

## POINTS.

### I.

**The limit of jurisdiction of the Statutory Court of three Judges for which provision is made by Section 266 of the Judicial Code, is clearly set forth in said Section, and shows that the cause under consideration is not one therein embraced.**

So far as material, section 266 of the Judicial Code provides:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of *any officer of such State* in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted * * * unless the application * * * be heard and determined by three judges, * * *, and unless a majority of said three judges shall concur in granting such application. * * * Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit, * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree * * *."

The statute thus provides only for cases wherein the action of *an "officer of such state"* is sought to

be restrained either in the enforcement of a "statute of a state," or in the enforcement of an order of "an administrative board or commission acting under and pursuant to the statutes of such state."

Herein the action sought to be restrained *is not* the action of an officer of the state of New York but of the Receiver of Taxes and the City Collector of New York City, both of whom were appointed by the Comptroller of the City of New York, himself a municipal officer, and by no stretch of judicial construction can such officers be classified as officers of the State of New York. They are in fact, as shown by paragraph "Fourth" of Return herein (pp. 3, 4) and Exhibits 1-4 annexed thereto (pp. 6-16), local officers; and not being state officers, the provisions of section 266 of the Judicial Code, accordingly, are not applicable.

This conclusion finds support in the case of *Connecting Gas Company* v. *Imes* (11 Fed. [2d] 191) wherein the collection of taxes by county treasurers of the State of Ohio was sought to be enjoined. Therein the District Judge of the Southern District of Ohio called to his assistance, pursuant to the provisions of section 266 of the Judicial Code, a circuit judge and another district judge. Upon the hearing before the three judges it was held that the case was not within section 266. Said the court (p. 194):

> "The nature of plaintiff's action * * * is in substance merely an action to enjoin the collection of a tax illegally levied * * *. Its action may be maintained against the treasurer, who is charged with the collection of the tax. It is not in form nor in substance an action under section 266, Judicial Code, to restrain the enforcement, operation or execution of any statute of a state, *by restraining the action of any state officer* * * *. It

may be admitted that section 266 would apply in an action brought to restrain the tax commission from making this valuation or assessment, or from certifying the same to the county auditor to be spread on the tax duplicate. Such is not the purpose of this suit. * * * The collection of the tax thus assessed is not vested in the tax commission, but is in the county treasurer * * * This suit is * * * to restrain the action by a county treasurer, whose duties and powers are derived, not from the commission's order, but from other provisions of the state statutes. This court is as competent as is a state court to grant that relief * * *, provided only its jurisdiction as a federal court is properly invoked because of the presence of a federal question."

It is, moreover, to be noted that in the *Connecting Gas Company* case the taxes involved were imposed by the State Tax Commission of Ohio, a *state* body, whereas herein the taxes claimed to be illegally levied were imposed by the Commissioners of Taxes and Assessments of New York City, who, as shown by Exhibit 4 of the Return herein (pp. 14-16) constituted a *local* body.

Further support for the conclusions of the statutory court herein is to be found in the decision of this court in *Ex Parte Collins*, 72 L. ed. 642 (decided June 4, 1928), a suit to restrain a city and its officers from proceeding under a resolution directing the paving of a street pursuant to a state statute, the cost to be assessed on the property benefited, the claim made being that there was no proper provision for giving the property owner a hearing. In holding that such a case did not come within the provisions of section 266 of the Judicial Code, this court said (p. 642):

"The suit is not one to restrain 'the enforcement, operation or execution' of a statute of a state within the meaning of § 266. That section

> was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public. • • • Thus, the section has long been held inapplicable to suits seeking to enjoin the execution of municipal ordinances, or the orders of a city board. And likewise *it has been held that the section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved.* • • • That the section was intended to apply only to cases of general importance is shown by the provision that notice of the hearing must be given to the governor and the attorney general—a precaution which would scarcely be deemed necessary *in a suit of interest only to a single locality.*"

The suit herein involved is of direct interest only to the City of New York, which receives all of the taxes the collection of which is sought to be restrained herein, and while notice of application for the injunction herein was given to the Governor and Attorney General of New York, such notice was unnecessary and improper as the case was not one coming within the provisions of Section 266.

To sustain its conclusion in *Ex Parte Collins* this Court cited with approval the case of *Connor* v. *Logan County*, 12 Fed. (2d) 789, wherein was considered the provisions of Section 266 as it applied to a case for injunctive relief against a board of county commissioners in levying assessments upon real estate for sewer construction in claimed violation of the 14th Amendment. Therein the Court in following the ruling in *Connecting Gas Company* v. *Imes* (supra) said (p. 790):

> "The application of the language of section 266 • • • was limited to the orders made by 'state' administrative boards or commissions as distinguished from local boards or commissions."

Herein, as stated, it appears from the Return that the Receiver of taxes of New York City and the City Collector are purely local officers, appointed by the City Comptroller himself a local officer, and that the taxes which are the subject of the litigation are payable into the general fund of said City.

However desirous it may be from the standpoint of the Attorney General of New York, as stated at page 2 of the Representation of the Attorney General herein submitted, that this court answer in the affirmative the question as to whether Section 266 is applicable herein, the plain provisions of the statutory jurisdictional limitation of the statutory court, cannot be overlooked. And it would appear from such provisions, and from the decisions above referred to, that the cause herein considered is not one to which may be extended the benefits of said section.

Thus the argument of the Attorney General and the plaintiff herein is one which should be addressed not to the Court but to Congress.

## II.

## The cases cited in support of the petitioner's application are inapplicable.

The case of *Ex Parte Ruder*, 271 U. S. 461, cited by petitioner at page 6 of its petition and by the Attorney General of New York at page 5 of his Representation in support of the claim that the defendants in the *Public National Bank* case were state officers, it appears from examination thereof, did not, as both the petitioner and the Attorney

General herein contend, interpret the language of Section 266 of the Judicial Code as meaning that local tax collectors are "officers of a state." Therein the question considered was as to the allowance of a direct appeal to this Court under the the provisions of Section 238 of the Judicial Code, and it was held that for want of a claim of unconstitutionality of the statute therein considered, no basis for direct appeal existed.

The case of *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, also cited by the petitioner, merely held that acts done under the authority of a municipal ordinance passed by virtue of a power conferred by a state are embraced by the Fourteenth Amendment. Such principle so laid down is in no way helpful to the interpretation of the specific statute involved herein.

In the case of *Gulf Fisheries Company* v. *MacInerny*, 276 U. S. 124, while the case was decided by a statutory court of three judges, the question as to the applicability of Section 266 was not raised, and moreover it appears that such question could not be raised, as the official therein sought to be enjoined was the county attorney, concededly a state official, acting in the enforcement of a statute of the state.

In the case of *Marcus Brown Company* v. *Feldman*, 256 U. S. 170, the question of the right to proceed under Section 266 of Judicial Code was not considered, nor could it well be raised, as therein it was sought to enjoin the district attorney, a state official, from enforcing a criminal statute of the state claimed to be in contravention of the Fourteenth Amendment.

In the case of *Chicago M. St. P. & P. R. R. Co.* v. *Risty*, 72 L. ed 365, an appeal from a decision of three judges in a case heard under Section 266, to

restrain county commissioners from levying assessments for benefits for the maintenance of a drainage system under the state agricultural drainage statutes, the decision proceeded wholly upon the merits of the controversy and the question of the jurisdiction of the statutory court was not raised or decided.

Similarly, in *St. Louis & Southwestern Railway Company* v. *Nattin*, 72 L. ed 541, the decision dealt solely with the claim of the validity of the statute therein considered without any reference to the question of jurisdiction under Section 266.

## III.

**The petition herein contains statements relating to disputed questions of fact and law at issue in the cause involved which have not yet been determined and which are wholly unnecessary and immaterial to the question presented on this motion.**

The defendants do not assent to the statements contained in the petition herein with respect to certain decisions of the Courts in cases relating to the validity of taxes imposed on shares of national banks and as to the scope of the statutes providing for assessment of bank shares and for the assessment of competing moneyed capital, nor to the statements therein with respect to the evidence presented before the Master appointed by the Court herein.

Thus they do not agree that *all* of the relevant provisions of the Tax Law of the State of New York, as stated by the petitioner (page 5), are

printed in its Schedule C annexed to the petition, there being other provisions therein providing for assessment of other moneyed capital in competition with the business of national banks.

And in paragraph V of its petition (page 7) the petitioner states that in the *Hanover National Bank* case the statute under which the tax involved herein was imposed was held to be discriminatory in violation of Section 5219 of the United States Revised Statutes. As shown in the cause which is the subject of this motion, the statute was amended since the *Hanover Bank* decision providing for a different method of taxation.

Likewise is the statement of petitioner, at page 8 of its petition, as to what was ultimately held by the Court of Appeals in the *Hanover* case, a subject of dispute between the parties to the Public National Bank case.

So, also, is there a dispute between the parties to this litigation as to what was held by the Court of Appeals in the case of *Peo. ex rel. Pratt* v. *Goldfogle*, and the effect of that decision requiring equal taxation of national bank shares and of competing moneyed capital. The subsequent action of the Tax Commissioners and the scope of the assessments made, as summarized by petitioner at pages 8-11 of its petition, were subjects sharply contested upon the hearings before the Master and the Court, and the defendants herein contend that the evidence clearly establishes that no discrimination existed in the assessment of bank shares and the assessment of competing moneyed capital.

Such subjects and questions, the defendants submit, should be reserved for hearing and determination on the merits herein and should not be advanced on this motion and are in no way helpful to the question of the jurisdiction of the statutory court now presented.

## IV.

## The defendants do not assent to the views of the Attorney General of New York on this motion and deem that Section 266 of the Judicial Code should be construed as not applicable herein.

Although notice of application for the injunction herein was given to the Attorney General of New York, such notice was given by the petitioner herein, the plaintiff in the action, under the mistaken belief that the cause was one entitled to be heard under section 266. And although the Attorney General appeared at the preliminary hearing and joined in the defendant's motion to dismiss the bill on the grounds that plaintiff had adequate remedies under the New York statutes for redress of its alleged grievance and that no equitable relief should be granted herein (Printed Record pp. 55-57), which motion was denied (p. 58), and exception taken by the defendants (page 75, Printed Record), he took no further part in the hearings before the Master or at the final hearing before the Court. This absence of participation by the Attorney General was due, no doubt, to the fact that the State of New York had no financial interest in the outcome of the litigation, as the taxes involved were payable entirely into the general fund of the City of New York.

The defendants did not raise any question as to the application of Section 266, and after the denial of their motion to dismiss the bill on broader jurisdictional grounds, they proceeded with the trial

before the Master, presenting evidence in support of the assessments alleged to be illegal and presented to the Court their argument upon the merits.

The question as to whether the cause was one provided for by Section 266 having, however, been raised by the Court itself and the Attorney General having submitted to this Court his Representation in support of the plaintiff's motion for mandamus to compel a determination by the statutory court, thus bringing to this Court the broad subject as to whether in all litigation similar to this in which municipalities are affected and not the State, the provisions of section 266 are applicable, the defendants oppose the motion, both because they deem that the conclusion made by the statutory court is sustained by the express provisions of the section and because they feel that the section should not be construed as applicable to such a case as this.

Here we have at issue the validity of local taxes imposed solely for the expenses of the government of a municipality, the City of New York, the officers of which it is sought to enjoin, who are represented by the Corporation Counsel of the City. Upon him alone should devolve the duty of sustaining the action of the local board, the Commissioners of Taxes, who imposed the taxes, and of the Receiver of Taxes, who is required to collect them.

If Section 266 is construed to apply to such an action merely because the taxes complained of levied by the local board, were imposed under a statute of state-wide application, then the Attorney General of the State, on whom notice is required to be served under the provisions of Section 266, would legally be placed in the position of attorney to local officers, instead of attorney to the State and to State officers.

The circumstance that many municipalities of the State might be affected by the determination made, affords no reason for bringing him into the litigation. In many cases municipalities are affected by a determination of the Court respecting statutes applicable throughout a State. His interest, at most, is general, and not direct as representing a local board or officer. And while his presence is essential where a complaint relates to the action of an officer of the State, whom he represents as attorney, it is not essential where the complaint relates to the action of a local board or local officer who is represented by the attorney of a municipality, upon whom alone rests the duty of sustaining the action of such local board or officer.

The defendants accordingly differ from the views of the Attorney General herein, and deem that Section 266 should not be construed as applicable to this case wherein the litigation concerns only the City of New York, and only its revenues, and not the revenues of the State of New York.

The suit herein is one to restrain the action of a *local* City officer in the enforcement of an order (namely, assessments for taxation) made by a *local* commission acting under and pursuant to a statute of a state.

The defendants quite agree with the petitioner that such a case is "of special importance" and should receive "special treatment in the interest of the public," and they feel that there are good reasons for requiring that such a case should be brought before a statutory court, but that in such event provision should be made not for notice to the governor and to the attorney general, but for notice to the officers of the municipality which would be affected by the determination made.

Such consideration, however, should be addressed to Congress and not to the Court since Section 266 now provides *not* for cases where injunction is sought restraining the execution of a statute of a state by restraining the action of an officer of a municipality in the enforcement of a statute or in the enforcement of an order made by an administrative board or commission acting under and pursuant to the statute of a state, but only for cases where it is sought to restrain the action of an officer of a state in the enforcement of a state statute or in the enforcement of an order of a board or commission acting under and pursuant to such statute, and it accordingly further provides for notice to the governor and to the attorney general of the state.

If the section were to be construed as applying to such a case as this because it is a case of special importance and should receive special treatment in the interest of the public and because good reasons exist for a determination in such a case by a statutory court, then it should also be construed as not requiring in such a case, notice to the governor and the attorney general.

This, however, would be in direct conflict with the express provisions of the section and would amount to judicial enactment and not judicial construction.

## V.

**The motion for mandamus should be denied.**

Dated, New York, October 26, 1928.

Respectfully submitted,
GEORGE P. NICHOLSON,
Corporation Counsel, Attorney
for the Receiver of Taxes and
City Collector of New York City.

WILLIAM H. KING,
EUGENE FAY,

of Counsel.

Office Supreme Court, U. S.
FILED
OCT 8 1928
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

October Term, 1928

No. 16 ORIGINAL

EX PARTE:

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK

*Petitioner.*

**Representation in Support of Motion for Leave to File Petition for Writ of Mandamus.**

ALBERT OTTINGER,
*Attorney-General of the State of New York.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

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No. — Original.

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Ex Parte:

In the Matter
of
THE PUBLIC NATIONAL BANK OF NEW YORK,
*Petitioner.*

Application for a Writ of Mandamus against the Honorable Learned Hand and the Honorable Augustus N. Hand, United States Circuit Judges, and the Honorable William Bondy, a District Judge of the United States District Court for the Southern District of New York.

## JOINDER IN MOTION AND REPRESENTATION IN SUPPORT THEREOF

The petitioner above named having moved for leave to file its petition above mentioned, and having given information of such motion to Albert Ottinger, Attorney General of the State of New York, who has, prior to the order now sought to be reviewed, participated, pursuant to Judicial Code, Section 266 (U. S. Code, Title 28,

Section 380) in the case referred to in the said petition, being Public National Bank of New York, plaintiff, against Andrew B. Keating, as Receiver of Taxes of the City of New York, and William Reid, Jr., as City Collector, defendants;

And since that section is a legislative recognition of an interest of the State of New York, appropriately represented by its Attorney General, in certain classes of litigations, and the central question upon this motion being whether the present litigation is within the provisions of that section, and the Attorney General deeming it to be required by the wording and purpose of the section, and for the best interests of the People of the State of New York, that the question presented be answered in the affirmative;

Now comes Albert Ottinger, Attorney General of the State of New York, and respectfully begs leave to join in the motion made by The Public National Bank of New York to file its petition praying for a writ of mandamus, and to obtain a rule directing the three judges named to show cause why they should not reconvene as a statutory court under the provisions of the section above mentioned, all as prayed in such petition, and respectively begs leave to make in support of said motion for leave to file said petition and on behalf of the People of the State of New York the following representation:

## I.

It is respectfully submitted that the present case is within the *purpose* intended to be served by Judicial Code, Section 266. The plaintiff sought and obtained from a United State District Court composed of three judges an interlocutory injunction suspending or restraining the enforcement, operation or execution of a statute of a State by restraining the action of an officer [of such State] in the enforcement or execution of such statute.

The three judges below on their own motion on final hearing of the action have regarded the bracketed words as excluding the present case from the effect of the section, because the defendants are the Receiver of Taxes of New York City and the City Collector, both officers of local, rather than State-wide, functions.

The statute enjoined is of State-wide operation, being an important part of the general tax law of the State. The bank tax is "in lieu of all other taxes whatsoever for state, county or local purposes upon said shares of stock." (Tax Law, Sec. 24-c.) The grounds upon which it is challenged are generally applicable throughout the State.

However, the machinery set up for assessment, collection and distribution is local in character. The tax is levied by boards of supervisors in the several counties, based upon assessments in each town, city, village, school and other special district (Sec. 24-d). It is collectible by county treasurers, except in Buffalo by the City Treasurer and in New York City by the Receiver of Taxes.

It is distributed by boards of supervisors among the tax districts composing each respective county, except, of course, in Buffalo and New York City (Sec. 24-g). These functions are performed by the various local officers under the advice and direction of, and subject to review by, the State Tax Commission (Secs. 171, 171-c, 173, 173-b).

The present suit, then, is brought by a bank in New York City against the collecting officers who menace it, and is based upon an assertion that the bank tax, as administered throughout the State, under a decision of the highest State court, is unconstitutional. Were there a similar separate suit and injunction against each of fifty-seven county treasurers, as well as the city treasurer of Buffalo and the present defendants, the entire collection machinery would necessarily be at a standstill in the entire State. The same would be true if the interests of the present plaintiff were threatened throughout the State and so its suit and injunction were against all, instead of only one, of the several local collecting officers.

## II.

Unquestionably the present suit is directed against the enforcement and execution of a state law, and thus is fulfilled the main condition for operation of Judicial Code, section 266. It is respectfully submitted that the incidental reference to "any officer of such State," which has been in the section since its inception, is not intended to exclude from its beneficial application a case otherwise so clearly within its purpose as the present one. In the debate upon the enactment of the section, appearing at 45 Cong. Rec. 7252–7257, no particular significance seems to have attached to the phrase. The defendants now involved are State officers in exactly the same sense as were the taxing officers of St. Louis, described as "state officers" in *ex parte Buder*, 271 U. S. 461, 462. See also, *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278.

The quoted words are of somewhat vague import, in this connection. Sometimes a State officer means one deriving his appointment and compensation directly from the State. There is no reason to suppose that is the test here.

Almost as limited is the suggestion that the test is whether the officer to be enjoined has State-wide functions. To entirely paralyze execution of the statute now in question, fifty-nine local officers must be enjoined. It might equally well happen that the State was divided, for purposes of execution of some State statute, into two parts only, and of those one great and one small, so that by an injunction against one local officer the enforcement of a vital statute in the greater part of the State would be paralyzed.

It is respectfully submitted that the safeguards intended by Judicial Code, section 266, become a very weak and uncertain protection to the State if the opinion below is a true interpretation of the section.

Wherefore, the Attorney General begs to join in the petition for appropriate steps to the end that the safeguards and expedition afforded by Judicial Code, section 266, may be applied to the present suit.

ALBERT OTTINGER,
*Attorney General of the State of New York.*

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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1928.**

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**No. 16, ORIGINAL.**

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EX PARTE: IN THE MATTER OF THE PUBLIC NATIONAL BANK OF NEW YORK, PETITIONER.

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## BRIEF OF ATTORNEY GENERAL IN SUPPORT OF MANDAMUS.

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The rule to show cause was fully argued before the Court on October 29, 1928, and permission was then given for the filing of this brief. No other preliminary statement appears to be necessary.

## POINTS.

### I.

**UNDER PROVISIONS OF JUDICIAL CODE, SECTION 266 (U. S. CODE, TITLE 28, SEC. 380) THREE JUDGES SHOULD SIT UPON THE ISSUANCE OR DENIAL OF AN INTERLOCUTORY INJUNCTION SUSPENDING OR RESTRAINING THE ENFORCEMENT OF A STATUTE, STATEWIDE IN ADOPTION, APPLICATION AND EFFECT, AND WITHOUT ROOM FOR LOCAL INTERVENTION BY ANY LOCAL LEGISLATIVE OR DISCRETIONARY ACT.**

*(a) Argument from the Wording of the Section.*

As originally enacted by act of June 18, 1910, c. 309, Sec. 17 (36 Stat. 557), the immediately relevant language was as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute* shall be issued or granted * * * upon the ground of the unconstitutionality of such statute, unless the application * * * be heard and deter-

*Act of March 4, 1913, C. 160 (37 Stat. 1013), inserted the words: "or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State."

> mined by three judges * * * and unless a majority of said three judges shall concur in granting such application. * * * Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney General of the State, and to such other persons as may be defendants in the suit. * * * The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited * * *. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

The debate upon the enactment of the measure, appearing at 45 Cong. Rec. 7252-7257, does not touch upon the significance of the words "any officer of such State." The debate shows that Congress was moved to safe-guard the States from certain interferences of the Federal courts in State affairs, and that Congress was aware that this remedial legislation would be burdensome to the courts. Nobody suggested that the quoted words would have any limiting effect. They seem to have been used rather incidentally to the main purpose, and without expressing any definite purpose in themselves.

The words are without accurate descriptive value. Reference to "any officer of such State," is not even so exact as would have been a reference to "any State officer," and the latter phrase is exceedingly vague,

except as it is sometimes enlightened by the immediate purpose.

The cases of District Attorneys in the State of New York will illustrate this suggestion. In the memorandum of the Corporation Counsel, page 8, he assumes that these officers are within the phrase "any officer of such State"; a position rather forced upon him by the cases of *Gulf Fisheries Company v. MacInerny*, 276 U. S., 124, and *Marcus Brown Company v. Feldman*, 256 U. S., 170. Yet a District Attorney is clearly not within the definition of "state officer" found in N. Y. Public Officers Law, Section 2.*

Historically, District Attorneys in New York State are State officers; originally they were assistants to the Attorney General, but for upwards of a century they have been independent from him. For many purposes and classifications they are State officers today. In the following respects, however, they are County officers: (1) There is one to each county, for the prosecution of crimes triable therein; (2) The Dis-

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*"Sec. 2. *Definitions.*—The term 'State officer' includes every officer for whom all the electors of the State are entitled to vote, members of the Legislature, justices of the Supreme Court, regents of the university, and every officer, appointed by one or more State officers, or by the Legislature, and authorized to exercise his official functions throughout the entire State, or without limitation to any political subdivision of the State, except United States Senators, members of Congress, and electors for President and Vice-President of the United States. The term 'local officer' includes every other officer who is elected by the electors of a portion only of the State, every officer of a political subdivision or municipal corporation of the State, and every officer limited in the execution of his official functions to a portion only of the State. The office of a State officer is a State office. The office of a local officer is a local office."

(Public Officers Law of N. Y. State, Section 2, complete.)

trict Attorney is elected by the voters of the county; (3) His compensation is fixed by the Board of Supervisors of the county by virtue of County Law, Sec. 12, subsec. 5, authorizing the Board to fix the compensation "of any county officer or employee"; (4) He is paid by the county.

That Congress, using the vague phrase, "any officer of such State" nevertheless contemplated injunctions against persons who are not strictly State officers, is indicated by the provisions for five days' notice to the Attorney General. In most States there is general statutory provision under which the Attorney General is required to defend suits against State officers. In New York the provision is that the Attorney General shall "prosecute and defend all actions and proceedings in which the state is interested." (Executive Law, Sec. 62, subsec. 1.) Were it certain that an injunction proceeding within Judicial Code section 266 would always be directed against a State officer, there would be no necessity for five days notice to the Governor and Attorney General. The provision that notice be given them, "*and to such other persons as may be defendants in the suit*" implies that sometimes such other persons may all be other than State officers.

The present time is appropriate for remarking that this provision for notice to the Attorney General is none the less proper where, as in the present suit, local officers are defendants. The provision does not contemplate that the local officers be represented by the Attorney General in the sense that he displace their personal or official counsel. It merely intends

that he have an opportunity, acting *amicus curiæ*, to represent the broader interests which the State will usually have when its statutes are challenged upon the ground of constitutionality. A similar policy and view of the Attorney General's function is expressed in N. Y. Executive Law section 68.*

The purpose of the enactment in which the words occur, is the key to construing a reference to "officers of the United States." (*Steele v. United States*, 267 U. S., 505). The words "an executive or judicial officer of any State," occurring in the Fourteenth Amendment, section 3, have received a very broad interpretation. The Attorney General of the United States was of opinion that this included county officers. (12 *Opinions* 182, 204). This opinion was followed by the Supreme Court of North Carolina. (*Worthy v. Barrett*, 63 *N. C.*, 199; *In re Tate*, 63 *N. C.*, 308). A

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*"Sec. 68. *Attorney-general to Appear in Cases Involving the Constitutionality of an Act of the Legislature.*—Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original of appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute."

(Executive Law of N. Y. State, Section 68, complete.)

Federal Circuit Court sitting in that State likewise instructed a jury that a constable was within the provision (*United States v. Powell*, 27 Fed. Cas., 605), saying:

> "The words of the statute, gentlemen, are broad enough to embrace every officer in the State. There can be no office which is not either legislative, judicial or executive; and there can be no question, it seems to the court, but that, unless it be possible to find some external reasons for giving this broad language a narrower meaning, it embraces every office in the State."

In summary, it is respectfully submitted that the phrase "any officer of such State" is so uncertain in its application as to create a doubt that it could have been intended to set apart the cases coming within Judicial Code, Section 266; a doubt which is increased upon noting that the phrase received no attention when Congress was debating the bill and the burden it would cast upon the courts, and further increased by noting the provision relative to the Attorney General. Unless the otherwise vague phrase receives definite meaning from the purpose of the enactment, or from some other extrinsic source, it means no more than "any officer *in* such State."

(*b*) *Argument from the Purpose of the Section.*

The whole debate upon the enactment of the measure (see 45 Cong. Rec. 7252-7257, previously cited) at least records the general purpose of the measure, if

that could otherwise be doubtful. As Senator Burton said of the bill:

> "It evidently recognizes the superior degree of consideration and sanction which should be given to a State statute, and prevents hasty interference with the action of a sovereign State."

The Supreme Court has from the first given Judicial Code, Section 266, a liberal construction in the light of that purpose, and was supported in such construction by the amendment of 1913. (See *Okla. Gas Co. v. Russell*, 261 U. S. 290, 292. Similarly, the court has given a liberal construction of Judicial Code, Section 237, a. *John P. King Mfg. Co. v. Augusta*, 277 U. S. —; 48 Sup. Ct. 489.) If it was correct interpretation, in view of the remedial purpose of Section 266, to treat its reference to statutes as including the case, like in reason, of administrative orders, then certainly there is nothing in the purpose of the section which requires a narrow interpretation of the phrase "any officer of such State." On the contrary, the purpose expressed in the section reaches sometimes to cases where a statute is being enforced by an officer of less than State wide functions.

(c) *Consideration of the Recent Cases.*

*Ex parte Buder*, 271 U. S. 461, involved as defendants certain taxing officers of the City of St. Louis, apparently much like the present defendants. We note that they are mentioned as being "State officers," but this is the recital preceding the opinion of the court.

The court expressed no opinion upon the present question, but denied that Judicial Code, Section 266, was applicable, because the question presented was of construction, rather than constitutionality.

*Smith v. Wilson*, 273 U. S. 388, was a suit to enjoin certain officials of Texas; whether State or local does not certainly appear and does not matter. There was no application for a preliminary injunction, and direct appeal was taken to the Supreme Court from a final decree by three judges. This appeal was dismissed on the ground that Judicial Code, Section 266, was inapplicable in the absence of final hearing upon application for preliminary injunction.

*Gulf Fisheries Co. v. MacInerney*, 276 U. S. 124, was a suit to enjoin a county attorney from instituting criminal proceedings to enforce payment of a tax under a general statute. Three judges denied injunction, and upon direct appeal the decree was affirmed, without discussion of the present question.

*Chicago, etc., R. R. v. Risty*, 276 U. S. 567 (argued Feb. 21, 23, 1928; decided Apr. 9, 1928), was a suit to enjoin certain county commissioners from enforcing a local assessment, asserting lack of due process in the proceedings, particularly lack of notice. Three judges denied the application and upon direct appeal to the Supreme Court the decision below was affirmed. Apparently the court should not have entertained the appeal, but the question was not presented or considered.

*St. Louis, etc., R. R. Co. v. Nattin*, 277 U. S. —, 48 Sup. Ct. 438 (argued Mar. 2, 1928; decided May 14,

1928), was a suit to enjoin the tax collector of a Louisiana road district from collecting a special assessment imposed by a local legislative body under authority of a State statute. Various constitutional objections were advanced, lack of notice being one. Three judges denied injunction, and upon direct appeal the decree was affirmed. This case is just like the last in respect to the present question.

*Ex parte Williams*, 277 U. S. ——, 48 Sup. Ct. 523, (submitted April 11, 1928; decided May 21, 1928) presented the thought provoking spectacle of an injunction suit against 71 county treasurers of Nebraska, but inasmuch as it was to enjoin an assessment, which was neither a statute nor an order, the Supreme Court denied mandamus. In conclusion, Mr. Justice Brandeis specifically reserved the present question:

> "As we hold that the action of the state and county boards which is alleged to be discriminatory is not an order within the meaning of section 266, we have no occasion to consider whether the lower court was right in holding that the 'county treasurers are not officers of the state of Nebraska,' or whether there are other reasons why the suit is not within the scope of that section."

*Ex parte Collins*, 277 U. S. ——, 48 Sup. Ct. 503, (submitted April 30, 1928; decided June 4, 1928) was a motion for leave to file a petition for mandamus, which the Supreme Court denied. The injunction suit was against the City of Phoenix, Arizona, and a private Arizona corporation, to enjoin the city, its officers,

and the contractor from paving a street upon which the plaintiff owned property. The improvement, if made by the city, under provisions of general state statutes, would have involved certain assessments against plaintiff's property. He claimed lack of due process, because the statutes made no provision for a hearing.

The opinion, by Mr. Justice Brandeis, deals with the present question as directly that it should be considered *obiter*. But for the distinguishing of the case now presented, from the Willis case, we particularly call attention to the last sentence of the opinion:

> "Though here the alleged unconstitutionality rests in the enabling act, the case does not differ substantially from one where the sole claim is that a city ordinance is invalid. Moreover, the enabling act is not itself being enforced within the meaning of section 266. That act merely authorizes further legislative action to be taken by the city, as by the resolution here in question. It is that municipal action, and the statute of a state, whose 'enforcement, operation, or execution' the petitioner seeks to enjoin."

It is respectfully submitted, upon the same reasoning, that the alleged unconstitutionality, by lack of notice, could not truly rest in the enabling act. Although the statute neglected to make that requirement, doubtless such notice could have been otherwise provided, and the requirements of due process would thereby have been satisfied. (*Bi-Metal v. Colorado*, [1915] C. C. Dec.)

(c) *What is Excluded from the Operation of Federal Code, Section 266.*

In the handling of this point we suggested the construction of this section, as requiring that three judges should sit upon the hearing or denial of an interlocutory injunction suspending or restraining the enforcement of a statute, state-wide in adoption, application and effect, and without room for local intervention by any local legislative or discretionary act. We have endeavored to show that this is the narrowest construction justified by the well known and avowed purpose of the section, that no narrower construction is required by its language, and that the two cases where the Supreme Court stated the present question (*Ex parte Williams* and *Ex parte Collins*) are by no means inconsistent with the suggested construction.

Whether a broader construction is not appropriate, including special statutes of the character involved in *Ex parte Metropolitan Water Co.*, 220 U. S., 539, is a question that may be debated. (See also, *Ohio v. Wyo.*, 264 Fed., 385, affirmed 249 U. S., 554.) It is sufficient to point out that such a case should not be precluded merely because of the low official degree of the defendants. That was a suit against a municipal corporation created as the Kaw Valley Drainage District of Wyandotte County, Kansas, and against the individuals constituting its board of directors, to enjoin them from appropriating certain lands of the plaintiff as authorized under the statute creating the district. The Supreme Court issued mandamus to

compel three judges to sit. Incidentally it said (220 U. S., 566), quoting with approval the court below:

> "Neither have I any doubt that the action is to restrain the action of an officer of the State of Kansas, namely, the Governor. This is so because the state statute in question provides that when the Governor issues his proclamation, which he has done, he shall at once take possession of the property either in person, or he may designate the officers of the drainage board to take such possession for him and in his name, but such officers of the drainage board to act as agents of the Governor."

We respectfully submit that such elaboration, either in the statute or judicial reasoning upon it, is artificial and unnecessary.

Whether a case is essentially local or essentially state wide, so as to be entitled to the safeguards of Judicial Code, section 266, should be determined in the light of the questions presented, and the substantial effect of a decision upon them, rather than the classification, frequently uncertain or fortuitous, of the official defendants. Congress intended no line of demarcation [illegible]

It did not intend that local assessments be placed under the protection of Judicial Code, section 266, by the mere circumstance that State Tax Commissioners were given some function of equalization, or were required to defend, whether under statutory authority or choice of the litigants. (*Ex parte Williams, supra.*) Such cases are essentially local, no matter how many

localities may be similarly interested, and they are not less local because a State officer is joined as a defendant.

*Connecting Gas Co. v. Imes*, 11 Fed., 2nd, 191, was such a case of a local assessment; moreover, the objections to it do not appear to have been predicated upon its statutory authority, and the Ohio Tax Commissioner was not originally a defendant, but sought to intervene.

*Ex parte Collins, supra*, was likewise, and quite irrespective of the official capacities of the defendants, essentially a local issue, and did not become otherwise by reference to the enabling statute.

(*c*) *What is Included Within the Operation of Judicial Code, Section 266.*

When the section was originally enacted, Congress was most concerned about public utilities rates. This is a function that in most States is either exercised by the Legislature directly, or delegated to a board of State-wide jurisdiction. In New York State the function was formerly committed to separate Public Service Commissions, each controlling a separate district. It would not be surprising if some State saw fit to entrust bus rates to localities. We may have statutes providing for rates to be fixed by a town board and enforced by the Attorney General. We also may have statutes directly fixing State-wide rates to be enforced by constables. We submit that the Judicial Code provision should not be construed to include the former and exclude the latter.

We submit that injunctions against district attorneys to to enjoin their enforcement of state-wide statutes are included within the provision. Quite irrespective of their official classification, the purpose of the provision extends to such injunctions. Moreover, while the Supreme Court has never expressly considered whether a district attorney is "any officer of a State" within the meaning of the provision, it has several times acted upon the assumption that they are included. See *Marcus Brown Co. v. Feldman*, 256 U. S., 170; *Noble v. Douglas*, 261 U. S., 165; *Fenner v. Boykin*, 271 U. S., 241; *Gulf Fisheries Co. v. MacInerney*, 276 U. S., 124. Whether suit is brought by one plaintiff against one district attorney, or against several or all within a State, should not be decisive if the purpose of the suit is to enjoin a penal statute of general application.

The case of a general taxing statute, entrusted for its enforcement to county tax collectors, stands upon the same ground (*Rast, Tax Collector for Duval County, Florida, v. VanDeman & Lewis Company*, 240 U. S., 342).

That this is the present case will be submitted under the next and concluding point.

## II.

### Three Judges Should Sit in the Present Case.

The Legislature of New York, for the support of the State and its subdivisions, has imposed, by as many statutes, about a score of taxes. Some are locally ad-

ministered but the money passes to the State; some are locally administered and divided between the State and locality; some are locally administered for the exclusive benefit of the locality; some are State administered for the benefit of the State, the localities, or for divisions of various sorts. All are consolidated in one chapter called the Tax Law. All are part of one unified scheme by which the State finances and fulfills its governmental functions, directly and through the local subdivisions.

The bank tax statute which is now threatened is of State-wide operation, and an important part of that general tax law. The bank tax is "in lieu of all other taxes whatsoever for State, county or local purposes upon said shares of stock" (Tax Law, Sec. 24-c). The grounds upon which it is now threatened are equally applicable throughout the State. They are, in brief, that under the alleged too narrow construction placed by the Court of Appeals, in *People ex rel Pratt v. Goldfogle*, 242 N. Y., 277, and companion cases, upon the words "moneyed capital coming into competition with the business of national banks," as used in Chapter 897 of 1923, that statute fails to give the equality of treatment to national banks that is essential to a constitutional tax upon them.

However, the machinery set up for assessment, collection and distribution is local in character. The tax is levied by boards of supervisors in the several counties, based upon assessments in each town, city, village, school and other special district (sec. 24-d). It is collectible by county treasurers, except in Buffalo by the

City Treasurer and in New York City by the Receiver of Taxes. It is distributed by boards of supervisors among the tax districts composing each respective county, except, of course, in Buffalo and New York City. (Sec. 24-*g*). These functions are performed by the various local officers under the advice and direction of, and subject to review by, the State Tax Commission. (Secs. 171, 171-*c*, 173, 173-*b*).

The statute is not an enabling act in any sense. It is an explicit command addressed by the State to the local officers. There is no room for local legislation or discretion. These local officers are creatures of a statute, the city charter. (Subsequently, by the 1923 so-called City Home Rule amendment to Article XII of the State Constitution, and legislation under it, the city received power to amend the charter, as shown at page 6 of the Return made by judges to the present Rule.) These local officers, defendants in the present suit, act in the capacity of administrative officers of the State under the Tax Law, with respect to the collection of taxes upon bank shares, and do not act under the provisions of the charter relating to the taxation of other property. This matter is covered in the four page memorandum last filed by the petitioner.

The present suit, then, is brought by a bank in New York City against the collecting officers who menace it, and is based upon an assertion that the bank tax, as administered throughout the State, under a decision of the highest State court, is unconstitutional. Had this bank been located elsewhere than in New York City or Buffalo, its suit would have been against a County

Treasurer. Such a suit is not distinguishable from a suit against a District Attorney to enjoin the enforcement of a State-wide penal statute.

Just as *Ex parte Collins* presented a question that was substantially local, so this case presents a question that is substantially State-wide. The safeguards provided by Judicial Code, section 266, should not be withheld from this suit.

Respectfully submitted,

ALBERT OTTINGER,
*Attorney General of the State of New York.*

**Brief by**
HENRY S. MANLEY,
*Assistant.*

# Supreme Court of the United States

OCTOBER TERM, 1928.

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No. 16—Original

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*Ex Parte:*

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,

*Petitioner.*

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## The Return of Learned Hand, United States Circuit Judge, Augustus N. Hand, United States Circuit Judge and William Bondy, Judge of the District Court of the United States for the Southern District of New York.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Learned Hand, United States Circuit Judge, and Augustus N. Hand, United States Circuit Judge, and William Bondy, Judge of the District Court of the United States for the Southern District of New York, do hereby make return to the rule to show cause issued herein on October 8, 1928 why a writ of mandamus should not issue out of this Court requiring them to reconvene as a statutory court of three Judges as provided by Section 266 of

the *Judicial Code* (Section 266, Title 28, of the United States Code) for the final hearing and determination of the cause entitled *The Public National Bank of New York against Andrew H. Keating*, as Receiver of Taxes of the City of New York and *William Reid, Jr.*, as City Collector, pending in the District Court of the United States for the Southern District of New York, in equity, and respectfully answer and certify to the Honorable Supreme Court of the United States as follows:

FIRST.—Your respondents believe that the petitions correctly sets out the proceedings appearing of record in said cause insofar as said petition undertakes to relate them. Your respondents further believe that the allegations and contentions set forth in the petition herein are substantially similar to the allegations and contentions set forth in the bill of complaint and proceedings in said cause.

SECOND.—The printed record in said cause referred to as Schedule "B" in the petition herein contains a record of all proceedings and testimony in said cause.

THIRD.—As shown by the record of the proceedings therein, as set forth in said Schedule "B", the suit is brought by a National Bank, the Public National Bank of New York, the petitioner herein, to restrain defendants therein, the Receiver of Taxes and the City Collector of the City of New York, from collecting a tax levied upon shares of plaintiff's stock for the year 1920 by the Commissioners of Taxes and Assessments of the City of New York under the provisions of the Tax Law of the State of New York, Chapter 60 of the Consoli-

Penal Laws, (Chapter 41, Laws of 1965) as amended by Chapter 481 of the Laws of 1965 of the State of New York.

Pursuant to Order to Answer, dated December 6, 1965, made herein, one of the defendants in said cause, the Receiver of Taxes in the City of New York, appointed by the Comptroller of the City of New York pursuant to Section 132 and 132 of the Charter of the City of New York (Laws of New York, 1961, Chap. 666) with power to collect the tax in question, the December 31, 1965, Sections 132 and 132 of the Charter were duly amended and superseded by Local Law No. 16 of 1965 of the City of New York, approved by the Mayor of said City December 31, 1965. By the provisions of said Local Law No. 16 of 1965 the office of the City Collector was created and by Rules and Regulations of the Comptroller of the City of New York duly promulgated thereunder on January 1, 1967, certain of the powers and duties of the Receiver of Taxes of the City of New York, including the power to collect the tax in question from the petitioner, were transferred to the City Collector (Record, p. 79). On January 1, 1967 the defendant Gold was duly appointed City Collector by the Comptroller of the City of New York and made a party defendant in said cause by stipulation and order (Record, pp. 97-71). By further Rules and Regulations of the Comptroller duly promulgated January 1, 1968, the office of the Receiver of Taxes was abolished and all the powers and duties theretofore exercised by the defendant Gosling as Receiver of Taxes, which had not theretofore been transferred to the said City Collector by the Rules and Regulations of January 1, 1967, were transferred to and devolved upon the City Collector, the defendant Gold.

Annexed hereto and made part hereof are true copies of said Local Law and promulgations, marked "Exhibits 1, 2 and 3" respectively.

Relevant provisions of the Charter of the City of New York, relating to the office charged with the duty of imposing and collecting taxes in the City of New York are annexed hereto and made part hereof and marked "Exhibit 4".

FIFTH.—Said tax, the collection of which is sought to be enjoined, was assessed against the stockholders of the petitioner by the Commissioners of Taxes and Assessments of the City of New York. Upon collection thereof by the defendant Reid said tax is required to be paid by said defendant "into the Treasury of said City, to the credit of the general fund thereof" (Sec. 24-f, New York Tax Law, Schedule "C" of the petition, p. 22).

SIXTH.—Your respondents of their own motion raised the question whether said cause arose under Section 266 of the Judicial Code and thereupon handed down an opinion, a true copy of which appears as Schedule "B" of said petition. Subsequently, your respondents made the order dissolving the Court of the three Judges, a true copy of which order appears as Schedule "A" of said petition.

SEVENTH.—Your respondents further respectfully refer to their said opinion as stating their reasons for dissolving said Court of three Judges and for making the said order giving effect thereto.

And these are the reasons which your respondents offer why a mandamus should not issue requiring them to reconvene as a statutory court of three Judges as provided by Section 266 of the

Judicial Code for the final hearing and determination of the said cause.

But your respondents respectfully submit to the judgment of this Honorable Court and will enforce any direction given by the Court in the premises.

New York, October 24, 1928.

LEARNED HAND,
Circuit Judge.

AUGUSTUS N. HAND,
Circuit Judge.

WILLIAM BONDY,
District Judge.

## Exhibit 1.

LOCAL LAWS

OF

THE CITY OF NEW YORK

FOR THE YEAR 1926

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No. 16

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A LOCAL LAW

TO SUPPLEMENT THE GREATER NEW YORK CHARTER IN RELATION TO CERTAIN BUREAUS OF THE DEPARTMENT OF FINANCE AND THE COLLECTION OF CITY REVENUE, TAXES, ASSESSMENTS, AND ARREARS OF THE SAME.

*Be it enacted by the Municipal Assembly of The City of New York as follows:*

SECTION 1. Title one of chapter six of the Greater New York Charter, as re-enacted by chapter four hundred and sixty-six of the laws of nineteen hundred and one, is hereby supplemented by adding thereto a new section to follow section one hundred and fifty-one, to be section one hundred and fifty-one-a, to read as follows:

§151-a. Consolidation of certain bureaus of the department of finance; bureau of city collections.

The comptroller is hereby authorized and empowered to adopt and prescribe rules and regulations for the reorganization and consolidation into one bureau the present bureau

for the collection of city revenue, established by subdivision one of the preceding section, the bureau for the collection of taxes, established by subdivision two of the preceding section, and the bureau for the collection of assessments and arrears, established by subdivision three of the preceding section, and upon the promulgation of such rules and regulations by the comptroller the bureau for the collection of city revenue, the bureau for the collection of taxes and the bureau for the collection of assessments and arrears shall thereupon become consolidated into one bureau to be known as the bureau of city collections.

The comptroller shall exercise and perform through the bureau of city collections all the powers and duties which he now exercises and performs through the bureau for the collection of city revenue, the bureau for the collection of taxes and the bureau of assessments and arrears.

The comptroller shall appoint a person to be the head of the bureau of city collections, who shall be known as the city collector. All of the provisions of the Greater New York Charter and of every other law in relation to the collector of city revenue, the receiver of taxes and the collector of assessments and arrears shall apply to the office of city collector established by this section. The bond now prescribed by law for the receiver of taxes shall be given and may be renewed by the city collector.

In order to effect gradually the consolidation authorized by this section, the comptroller in his discretion may prescribe by such rules and regulations for the consolidation of the

branches of such bureaus in one, any or all of the boroughs of the city and the branch resulting from such consolidation shall be the representative of all such bureaus in such borough until consolidation pursuant to this section be fully effected whereupon such branch shall be the representative of the bureau of city collections. The comptroller shall appoint the head of the office in any borough in which the branches have been so consolidated.

Upon the final consolidation of such bureaus in the manner prescribed in this section, the office of collector of city revenues, the office of receiver of taxes and the office of collector of assessments and arrears shall be abolished, and the city collector established by this section shall succeed to all the rights, powers and duties of such abolished offices.

Subject to the power of the comptroller to abolish positions or to transfer employees from one position to another, all employees of a bureau or branch thereof consolidated pursuant to this section shall be continued without examination in the employ of the bureau or branch with which the bureau or branch in which they are now employed is consolidated.

§2. The following enumerated sections of the said Greater New York Charter shall be deemed amended and superseded to the extent prescribed by this local law:

Section 151, subdivisions 1, 2 and 3, as reenacted by chapter 466 of the laws of 1901;

Section 151, first sentence, as amended by chapter 206 of the laws of 1917;

* * * * * * *

Sections 152 and 154, as amended by chapter 191 of the laws of 1916.

* * * * * * *

§3. This law shall take effect immediately.

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The City of New York, Office of the City Clerk, } ss.:

I hereby certify that the foregoing is a true copy of a Local Law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 31, 1926, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

## Exhibit 2.

RULES AND REGULATIONS FOR THE REORGANIZATION AND CONSOLIDATION OF THE BRANCH OFFICES OF THE RECEIVER OF TAXES AND THE COLLECTOR OF ASSESSMENTS AND ARREARS IN THE BOROUGH OF MANHATTAN, AND OF THE BUREAU OF CITY REVENUE, INTO ONE BUREAU, TO BE KNOWN AS THE BUREAU OF CITY COLLECTIONS.

(Pursuant to the provisions of Local Law No. 16, passed by both branches of the Municipal Assembly of the City of New York and approved by the Mayor on December 31, 1926.)

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The following Rules and Regulations for the reorganization and consolidation of the Bureaus in the Finance Department, pursuant to Local Law No. 16 of 1926, are hereby promulgated:

RULES AND REGULATIONS.

The Manhattan branch offices of the Receiver of Taxes and of the Collector of Assessments and Arrears, together with the Bureau of City Revenue, as a whole shall be reorganized and consolidated into one Bureau, to be known as "The Bureau of City Collections," to be effective as at January 1, 1927, pursuant to the provisions of Local Law No. 16, passed by both branches of the Municipal Assembly of the City of New York and approved by the Mayor on December 31, 1926.

The head of the Bureau of City Collections shall be the City Collector, and he shall exercise all the powers, duties and responsibilities heretofore vested in the Receiver of Taxes and the Deputy Receiver

of Taxes in the Borough of Manhattan and of the Collector of Assessments and Arrears in the Borough of Manhattan, and of the Collector of City Revenue in so far as the powers and duties of the latter affect the collection of City revenue, subject to all the laws appertaining thereto and laws amending existing statutes.

* * * * * * *

(Signed) C. W. BERRY,
Comptroller.

Dated, New York, January 1, 1927.

## Exhibit 3.

RULES AND REGULATIONS FOR THE REORGANIZATION AND CONSOLIDATION OF THE OFFICES OF THE RECEIVER OF TAXES AND THE COLLECTOR OF ASSESSMENTS AND ARREARS, AND OF THE BUREAU OF CITY REVENUE, INTO ONE BUREAU, TO BE KNOWN AS THE BUREAU OF CITY COLLECTIONS.

(Pursuant to the provisions of Local Law No. 16, passed by both branches of the Municipal Assembly of the City of New York and approved by the Mayor on December 31, 1926.)

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The following Rules and Regulations for the reorganization and consolidation of the Bureaus in the Finance Department, pursuant to Local Law No. 16 of 1926, are hereby promulgated to complete consolidation in all Boroughs:

RULES AND REGULATIONS.

The offices of the Receiver of Taxes and of the Collector of Assessments and Arrears, together with the Bureau of City Revenue, shall be reorganized and consolidated into one Bureau, to be known as "The Bureau of City Collections," to be effective as at January 1, 1928 (as to those divisions not theretofore consolidated), pursuant to the provisions of Local Law No. 16, passed by both branches of the Municipal Assembly of the City of New York and approved by the Mayor on December 31, 1926.

The head of the Bureau of City Collections shall be the City Collector, and he shall exercise all the powers, duties and responsibilities heretofore vested

in the Receiver of Taxes and the Collector of Assessments and Arrears, and of the Collector of City Revenue in so far as the powers and duties of the latter affect the collection of City revenue, subject to all the laws appertaining thereto and laws amending existing statutes.

* * * * * * *

(Signed) C. W. BERRY,
Comptroller.

Dated: New York, January 1, 1928.

## Exhibit 4.

Section 96 of the New York Charter, provides:

"There shall be the following administrative Departments in said city:

Department of Finance. • • •

Department of Taxes and Assessments. • • •"

Section 97 of the Charter provides:

"The head of the Department of Finance shall be called the Comptroller of the City of New York. He shall be elected at the general election. • • •"

Section 149 of the Charter provides:

"The Department of Finance shall have control of the fiscal concerns of the corporation • • •."

Section 151 of the Charter, prior to its amendment by Local Law No. 16 for 1928, provided:

"There shall be eight bureaus in this department."

• • • • • • •

2. "A bureau for the collection of taxes, the chief officer of which shall be called the Receiver of Taxes • • •."

3. "A bureau for the collection of assessments and of such taxes, assessments and water rents as are in arrears, the chief officer of which shall be called the Collector of Assessments and Arrears • • •."

• • • • • • •

5. "A bureau for the reception and safe keeping of all moneys paid into the treasury of the city * * * the chief officer of which shall be called the chamberlain."

Section 152 of the Charter, prior to its amendment by Local Law No. 16 for 1928, provided:

"The Comptroller shall appoint the receiver of taxes and arrears. The receiver of taxes and the collector of assessments and arrears, before entering upon the duties of their offices, shall enter into a bond to the City of New York, to be approved by the chamberlain and comptroller in the penal sum of twenty-five thousand dollars which bond shall be conditioned for the faithful performance of the duties of the office by the officer giving such bond * * *."

Section 155 of the Charter provided:

"The receiver of taxes and the collector of assessments and arrears shall each have his chief office in the Borough of Manhattan at such places as shall be from time to time by ordinance of the board of aldermen designated for that purpose."

Section 118 of the Charter provides:

"The Mayor shall appoint the heads of all departments and all commissioners, except as otherwise provided in this act, * * * and also the members of any other local board and all other officers not elected by the people, whose appointment is not excepted or otherwise provided for. Every head of department and person in this section named shall be subject to the

power of removal herein provided, hold his office for such term as is provided by this act, or otherwise, and in each case until a person is duly appointed, and has qualified in his place."

Section 885 provides:

"The head of the department of taxes and assessments shall be called the board of taxes and assessments. Said board shall consist of a president, who shall be designated in his appointment, and six other persons, one of whom at least shall be a person learned in the law who shall be called commissioners of taxes and assessments. • • • Not more than five of the said commissioners, including the said president, shall belong to the same political party and have the same political opinions on state and national issues. • • •"

(Hammicks & Layne, Inc.—40 Copies—10/24/28—770)